BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JAMES EARL BRYANT Claimant VS. **MIDWEST STAFF SOLUTIONS** Respondent AND **LUMBERMAN'S UNDERWRITING ALLIANCE** Insurance Carrier	)	Docket No. 1,010,656

ORDER

Respondent and its insurance carrier (respondent) appealed the August 4, 2003 preliminary hearing Order entered by Administrative Law Judge (ALJ) Steven J. Howard.

ISSUES

Judge Howard ordered respondent to pay temporary total disability compensation and provide medical treatment with Dr. Glenn M. Amundson.

Respondent argues that claimant's request for preliminary benefits should be denied because claimant's injuries and his need for continued medical treatment did not arise out of and in the course of his employment with respondent. In addition, respondent alleges that claimant failed to give timely notice of his alleged work-related accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Claimant alleges he injured his "back, both legs, and all other affected areas of the body" when, while "working on [a] furnace, [he] twisted and felt [a] pull in [his] back" and also suffered continuous aggravations thereafter while performing his "regular duties" by a series of accidents beginning March 2, 2003 and continuing through May 13, 2003. [1] Claimant alleges he gave notice to his employer on March 3, 2003, and on May 13, 2003.[2]

Respondent disputes that claimant gave proper notice of a work-related injury on March 3, 2003, but admits it received notice on May 16, 2003, for a March 2, 2003 accident. [3] Respondent further disputes that claimant suffered accidental injury on March 2, 2003, and that claimant thereafter suffered any work-related aggravations by a series of accidents through May 13, 2003. Respondent's notice defense, however, is premised upon claimant having suffered a single accident on March 2, 2003. Respondent acknowledges that if claimant suffered a series of accidents through May 13, 2003, then his May 16, 2003 notice was timely.

> Claimant alleges a specific date of injury on March 2, 2003. This Board should find that Claimant failed to provide Respondent proper notice of the alleged injury as evidenced by the testimony of Claimant's supervisor and Claimant's statements contained within the medical reports. Should the Board agree with Judge Howard's findings that Claimant sustained an accidental injury up and through May 13, 2003, and/or provided proper notice to Respondent, it should still reverse the Order of August 4, 2003, and deny Claimant any benefits, in that Claimant failed to sustain his burden of proof that he sustained an accidental injury that arose out of and in the course and scope of his employment with Respondent that caused a need for medical treatment. [4]

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[1] K-WC E-1 Amended Application for Hearing (filed June 4, 2003).

[2] Claimant/Appellee's Brief at 9 (filed Sept. 10, 2003).

[3] Brief of Respondent/Appellant at 5 (filed Sept. 4, 2003).

[4] *Id* at 6. (Actually, Judge Howard did not make a finding that claimant sustained a series of accidents through May 13, 2003. In fact, Judge Howard made no specific findings of fact nor conclusions of law. Judge Howard's August 4, 2003 Order only contained orders that respondent pay temporary total disability, medical and costs. But because the ALJ awarded claimant benefits, it is implicit in his Order that claimant satisfied his burden of proving personal injury by accident arising out of and in the course of his employment and that claimant gave timely notice of his accidental injury as these were raised as issues at the preliminary hearing.)

Although respondent challenges the ALJ's purported date of accident finding, the date of accident is not a jurisdictional issue on an appeal from a preliminary hearing order.[5] Therefore, the Board will only address that issue to the extent it is necessary to resolve the jurisdictional issue of whether claimant gave timely notice.

On March 2, 2003 through May 13, 2003, claimant was working for Shawnee Heating and Cooling through respondent, Midwest Staff Solutions. His job with Shawnee Heating and Cooling was of a heating and air conditioning technician where he would service and install residential furnaces and air conditioners. On March 2, 2003, claimant was working on a furnace. He twisted to grab a tool from his tool bag and felt a pulling in his low back. The next day claimant called the dispatcher, Richard: "I told him that I had hurt, pulled my back, hurt my back on the job last night, and it had gotten worse over the night and I need to get something done. I wasn't going to be in to work, be able to work."[6]

Claimant then called his chiropractor, Dr. Anderson and told him that he needed treatment but was unable to make it to the office. Dr. Anderson drove to claimant's house, provided minor treatment and instructed claimant to see a medical doctor. Claimant then went to the office of his family physician, where he was seen by Ann Cooper, advanced registered nurse practitioner, who referred him to Dr. Glenn M. Amundson.

Claimant was able to return to work and performed limited duty. He was provided a helper who did the more physical work. Between March 2 and May 13, 2003, claimant never worked over 22.5 hours in one week. He last worked on May 13, 2003. On that date he and his helper were setting an air-conditioner. "And when I was bent over welding it up I just felt it getting real bad, the back worsening." [7] That same day claimant had a conversation with Kevin, one of the owners. Claimant told him he was leaving work before his shift was over because he was hurting pretty bad and could not continue working.

Although claimant has a history of back problems, and was receiving on-going chiropractic treatment, he was able to work on a regular basis until March 2, 2003. Before that date he had days and weeks when he was completely pain free. Since March 2, 2003, he has never been pain free. Before March 2, 2003, claimant's chiropractor had never told him that he could not treat him and that he needed to see a medical doctor. Although he has continued to follow up or, treat with Dr. Robert M. Beatty after his October 1998 surgery, before March 2, 2003, claimant said no doctor had recommended another surgery. On cross examination, however, claimant acknowledged that in the year 2000 Dr. Beatty recommended he consider fusion surgery because of back complaints he was

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[5] *See* K.S.A. 44-534a(a)(2); K.S.A. 44-551(b)(1).

[6] P.H. Trans. at 5 and 6.

[7] P.H. Trans. at 9.

having at that time. Dr. Amundson has recommended a two-level fusion. At respondent's request, claimant has also been evaluated by Dr.Jeffrey T. MacMillan and he has made the same recommendation. Claimant denies suffering any injuries off the job at any time since March 3, 2003. Claimant acknowledged that he missed work during February 2003 due to back pain. He also acknowledges telling Dr. Cooper's nurse practitioner on March 3, 2003 that he had been experiencing back pain for two weeks and that he had gotten worse. Although claimant believes he told the nurse practitioner of a specific March 2, 2003 accident, he has no explanation for why her records contain no mention of it.

Lee Richard Ramsburg, Jr., claimant's supervisor at Shawnee Heating and Cooling, testified that he reviewed the attendance logs for February of 2003 and during that month claimant called in nine times with back complaints such that he was unable to work. None of those back complaints were reported as work-related. Mr. Ramsburg has no recollection of claimant calling in on March 3, 2003, nor does he have any recollection of claimant reporting a work-related injury any time in March, April or May 2003. His first knowledge that claimant was alleging a work-related injury was sometime in May 2003 when Kevin Ellis showed him a copy of a letter sent by claimant's attorney. Had claimant ever told of him of a work-related injury, Mr. Ramsburg said he would have told claimant to come in and fill out a claim form and turn it in to Nyra Moore, who runs their office. Nyra would have then faxed the form to Ann at Midwest Staff Solutions. Mr. Ramsburg would not go so far as to say claimant never reported a work-related injury, only that he had no recollection that he ever did and that if claimant had reported his back condition was work-related, Mr. Ramsburg would have instructed him to complete an incident report.

> Q. (Mr. Bryan) Was there anything that Mr. Bryant [claimant] said when he was sitting in the chair there testifying that wasn't true?
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> A. (Mr. Ramsburg) To the best of my knowledge, no.
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> Q. Have you ever seen him in the kind of pain he's in today?
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> A. Not that bad, no. [8]
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> . . .
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> Q. (Mr. Gordon) Claimant's counsel asked you obviously if you heard anything that wasn't true. I understand that you don't, you're now sitting up here and you don't want to call Mr. Bryant a liar. But obviously I asked you in direct examination whether or not you had any recollection whatsoever of Mr. Bryant alleging a work-related injury at any time in March of 2003 and what was your answer?

[8] P.H. Trans. at 33 and 34.

A. (Mr. Ramsburg) No.

Mr. Bryan: Object as argumentative.

Judge Howard: I'll overrule the objection.

A. No, I don't specifically recall it. [9]

When there is conflicting testimony, credibility is an important issue. The ALJ apparently found claimant credible. Here, the ALJ had the opportunity to personally observe the claimant and respondent's representative testify in person. By granting claimant's request for medical treatment, the ALJ either believed claimant's testimony over respondent's representative's testimony in order to find timely notice of a March 2, 2003 accident, or else the ALJ found a series of accidents through the last day worked.

Claimant testified concerning his worsening back condition and two specific work-related aggravations on March 2, 2003 and May 13, 2003. At the July 29, 2003 preliminary hearing, Mr. Ramsburg agreed claimant's condition appeared to be worse than he had ever observed it before while claimant was working for respondent. The Board finds that the preponderance of the credible evidence supports claimant's contention of a series of accidents through his last day worked. Accordingly, notice was timely.

As provided by the Act, preliminary hearing findings are not final but are subject to modification either upon presenting additional evidence at another preliminary hearing or upon a full hearing on the claim. [10]

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Steven J. Howard dated August 4, 2003 is affirmed.

IT IS SO ORDERED.

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[9] P.H. Trans. at 34 and 35.

[10] *See* K.S.A. 44-534a(a)(2).

Dated this _____ day of November 2003.

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant
J. Scott Gordon, Attorney for Respondent and its Insurance Carrier
Steven J. Howard, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director